STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP2305778

CJR Resources Inc Commercial & Industrial Floors Inc

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

_____

PRESIDING JUDGE -

This judgment was entered on the 16th day of December, 2015, and a copy mailed first class this 16th day of December, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

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Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CJR Resources, Inc. f/k/a Ron's Building Materials, Inc.,

Plaintiff,

v.

Commercial & Industrial Floors, Inc. and Dabney Maides,

Defendant/Third Party Plaintiff,

v.

Christopher M. Keel,

Third Party Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. NO: 2013-CP-23-05778

ORDER

This matter comes before the Court upon the following motions: (1) Plaintiff CJR Resources, Inc.'s ("Plaintiff" or "CJR") Motion for Summary Judgment on all causes of action it has asserted against Defendants Commercial & Industrial Floors, Inc. ("CIF") and Dabney Maides ("Maides") and on all causes of action asserted against Plaintiff by CIF and Maides; and (2) Third-Party Defendant Christopher M. Keel's ("Keel") Motion for Summary Judgment on all causes of action asserted against Keel by Defendants/Third-Party Plaintiffs CIF and Maides.

A hearing on these motions was held on November 3, 2015. Present at that hearing were counsel for Plaintiff CJR Resources, Inc. ("CJR"), M. Stokely Holder, Esq. of Kenison, Dudley & Crawford, LLC; counsel for Defendant/Third-Party Plaintiffs, William R. McKibbon, Esq., and counsel for Third-Party Defendant, Courtney C. Atkinson, Esq. of Metcalfe & Atkinson, LLC. Based upon the entire record in this case, including the pleadings, the Memoranda, exhibits and deposition testimony submitted in support of the above-referenced motions, and the arguments

presented to the Court at the November 3 hearing, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff CJR is a privately held South Carolina corporation that previously owned and operated Ron's Building Materials (hereinafter "the Business"), a business located in Greenville County whose primary business is the sale and installation of flooring materials. CJR is a family-owned business and Third Party Defendant Keel is one of the shareholders, together with his mother and father. Defendant CIF is also a South Carolina corporation, which was incorporated by Defendant Maides in 2008 for the purpose of purchasing the assets of the Business from CJR.

In July of 2008, CJR agreed to sell all of the Business's assets to CIF and Maides pursuant to an Asset Purchase Agreement (hereinafter "the APA"). Pursuant to the APA, CIF agreed to pay CJR the total purchase price of One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00) for the Business. Of the total purchase price, One Million Fifty Thousand Dollars ($1,050,000.00) was to be paid at closing, with the remaining Two Hundred Thousand Dollars ($200,000.00) to be financed by way of a promissory note, personally secured by Maides via an unconditional Guarantee of Payment (the "Personal Guarantee").

The APA contained both a non-compete clause and a non-solicitation clause. The non-compete clause covers the entire State of South Carolina and prohibits CJR and its shareholders from engaging in a "Competing Business," which is defined as the same business that "(CJR) is engaged in as of the Closing Date," for a period of five (5) years after closing of the APA. The APA's non-solicitation clause prohibits CJR and its shareholders from soliciting CIF's customers for a competing business, inducing customers to cease doing business with CIF and from hiring any employee of CIF for five years after "the Last Date of Employment."

As a material term of the APA, Keel was required to enter into an at-will employment relationship with CIF and to sign an Employment Agreement ("the Employment Agreement") with CIF, dated July 22, 2008, which was incorporated into the APA. Pursuant thereto, CIF agreed to pay Keel a base monthly salary along with other compensation and benefits. In addition to the APA's restrictive covenants referenced above, the Employment Agreement contains a separate non-compete provision[1], providing that, while employed by the Company and for five (5) years thereafter, Keel could not "become in engaged in, or render services for, any business that competes with the business in which Company is engaged...anywhere in the state of South Carolina." Otherwise, the Employment Agreement made clear that "[Keel]'s employment with [CIF] is 'at will' and may be terminated at any time by either Employee or Company".

The parties all acknowledge and agree that the original employment relationship between CIF and Keel was terminated by Keel in August of 2008 when Keel moved to Charleston, South Carolina. Accordingly, even assuming that any such obligations are enforceable as a matter of law, both the Employment Agreement's non-compete obligations as well as the APA's non-solicitation provision began to run in August of 2013 when the initial at-will employment relationship between CIF and Keel was terminated, whereas the non-compete obligations in the APA began to run on the July 2008 APA closing date.

In January of 2009, almost six (6) months after the original employment relationship between CIF and Keel ended, Keel decided to move back to Greenville and agreed to enter into a new employment relationship with CIF in consideration for CIF's new promise to eventually pay him an increased monthly salary of up to Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three cents ($8,333.33) (hereinafter "the 2009 Agreement"). At the time he

[1] Unlike the APA, the Employment Agreement does not include any non-solicitation language.

entered into this new agreement, Keel was not asked to and did not sign a written agreement containing any non-compete or non-solicitation obligations.

Keel was employed by CIF pursuant to the new 2009 Agreement from January of 2009 until resigning on May 31, 2013. Keel resigned at that time because CIF did not continue paying Keel the agreed upon monthly salary of Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents ($8,333.33) and unilaterally decided it would only pay Keel Two Thousand Six Hundred Forty-Two Dollars ($2,642.00) per month, less than a third of the agreed upon monthly amount. CIF notified Keel of the intended decrease in his pay on May 31, 2013, but made the decrease in his pay retroactive for two weeks prior such that the decrease in pay was reflected in the paycheck Keel received on June 1, 2013 for the two prior weeks. CIF has never paid Keel the difference in pay for work he performed for CIF prior to June 1, 2013. Additionally, and immediately prior to Keel's resignation on May 31, CIF also refused to pay, and has to date never paid, Keel the full commissions he earned prior to that date.

Following Keel's resignation on May 31, 2013, CIF ceased making the required payments due to CJR under the APA and related promissory note. Despite additional demand by CJR to Maides for the same payments pursuant to the Personal Guarantee, Maides has also failed to make the payments.

PROCEDURAL HISTORY

CJR instituted this action by filing its Complaint on October 28, 2013, alleging that CIF breached the APA by failing to make all payments required under the APA and related promissory note, and alleging that Maides failed to make all such payments as required by the Personal Guarantee. CIF filed its Answer, Counterclaim, and Third Party Complaint on December 18, 2013, denying CJR's claims and counterclaiming against Plaintiff for breach of contract and fraud in the inducement. The Defendants agree that all of CIF's counterclaims

against the Plaintiff, as well as all of CIF's defenses against Plaintiff's claims, rely on the same evidence CIF has in support of its third-party claims against Keel.

CIF's third-party claims against Keel were for breach of contract as to the APA, breach of contract as to the Employment Agreement, breach of duty of loyalty, promissory estoppel, fraud in the inducement, breach of contract accompanied by fraudulent act, and injunctive relief. In essence, CIF asserts that Keel breached the Employment Agreement by competing with CIF, and that Keel entered into the Employment Agreement by fraud because he never intended to abide by the terms of the Employment Agreement or work for the benefit of CIF; rather, he intended to "surreptitiously ... start another business venture of his own" and "complete with CIF and to engage in conduct designed to defeat the intent of the APA, the intent of the Employment Agreement, for the sole benefit of himself in competition with CIF." *CIF Answer, Counterclaims and Third-Party Claims.*

Keel filed his Answer on March 26, 2014 along with a Motion to Dismiss, pursuant to Rule 12(b)(6), denying all of CIF's claims and arguing that all such claims were barred by the statute of limitations. Keel also asserted various counterclaims against CIF, including breach of contract as to both the APA and the 2009 Employment Agreement, violation of the South Carolina Wage payment act for failure to pay all wages owed and failure to provide mandated notice of change in pay, and defamation. On May 20, 2014, CIF filed its Answer thereto, denying each counterclaim asserted against it by Keel. At the hearing thereon, the Honorable Robin B. Stillwell denied Keel's Motion to Dismiss so as to allow the parties additional time to conduct more discovery on the issue of when Defendants' alleged claims against Keel began to run and further flesh out what Judge Stillwell recognized on the record to be a potentially troublesome issue for the Defendants.

In August of 2014, Keel served CIF with his first discovery requests. When CIF failed to respond, Keel filed a Motion to Compel and, thereafter, upon admission by CIF that it owed discovery responses to Keel, the Court filed a Consent Order, dated July 9, 2015, compelling CIF to provide responses to Keel's discovery requests within thirty (30) days of entry of the Consent Order. CIF provided its responses with all alleged evidence in support of its claims against Keel, almost a year after being served with Keel's discovery requests, on August 9, 2015. Thereafter, CIF's owner, Defendant Dabney Maides, was deposed on August 19, 2015 before the August 31, 2015 discovery deadline set forth in the Consent Scheduling Order that was entered in this case on June 12, 2015. Keel consented to being deposed and was deposed on October 1, 2015 despite the fact that the discovery deadline set forth in the Consent Scheduling Order had already passed. Discovery in this matter was complete prior to the hearing at issue on the motions now before the Court.

STANDARD OF REVIEW

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); *see also Sumter Dairies, Inc. v. J.C. Pelfrey*, 268 S.C. 437, 234 S.E.2d 490 (1977). Rule 56(c) provides that a trial court may grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Robinson v. Est. of Harris*, 389 S.C. 360, 367, 698 S.E.2d 801, 805 (2010). Summary judgment is appropriate where "plain, palpable and undisputed facts exist on which reasonable minds cannot differ." *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984), *citing Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976). Summary judgment serves the important function of expediting "disposition of cases which do not require the services of a fact

finder." *Cox & Floyd Grading, Inc. v. Kajima Constr. Servs., Inc.*, 356 S.C. 512, 517, 589 S.E.2d 789, 792 (2003).

Where the plaintiff cannot meet the burden of proof as to every essential element of the causes of action alleged, summary judgment in favor of the defendant is properly granted. *See Oblachinski v. Reynolds*, 391 S.C. 557, 706 S.E.2d 844 (2011) (upholding grant summary judgment against plaintiff where plaintiff failed to prove an essential element of his claim). A fraud claim requires proof by clear and convincing evidence; thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Likewise, a grant of summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations. *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014).

LEGAL ANALYSIS

Keel and CJR are entitled to summary judgment as a matter of law as to all causes of action asserted against them by CIF and Maides for the following reasons: (1) CIF's claims are time-barred by the applicable provisions of the APA; (2) CIF's claims are barred by the applicable statute of limitations; (3) the contract on which all of CIF's claims are premised is unenforceable as a matter of law; and (4) CIF cannot prove the essential elements of each claim against Keel. In addition thereto, and as a result thereof, CJR is entitled to summary judgment as a matter of law on its claims against Defendants CIF and Maides.

I. Claims asserted by CIF and Maides

1. CIF's claims are time-barred by the applicable provisions of the APA.

Article VIII of the APA is titled "Indemnification; Remedies". Under Section 8.1 of the APA, it states in pertinent part that:

> *All representations, warranties, covenants and obligations in this Agreement and Ancillary Documents*[2] and any other certificate or document delivered pursuant to this Agreement shall survive the Closing, *only to the extent provided in Section 8.4(a) and (b).*

(emphasis added).

Section 8.2 of the APA is titled 'Indemnification and Reimbursement by Seller and Shareholder', and states, in pertinent part:

> Seller and Shareholder[3] ... will indemnify and hold harmless Buyer ... and will reimburse the Buyer Indemnified Persons for any loss ... incurred or sustained by Buyer (collectively, 'Damages'), arising from or in connection with:
> (a) any breach of any representation or warranty or any covenant or obligation made by Seller or Shareholder in this Agreement or Ancillary Document ... delivered by Seller pursuant to this Agreement.

In addition, Section 8.4 of the APA is titled 'Time Limitations and Notice of Claim' and states, in pertinent part:

> (a) Seller and Shareholder will have liability *(for indemnification or otherwise)* with respect to *any breach* of (i) a covenant or obligation to be performed or complied with prior to the Closing Date or (ii) *a representation or warranty, only if on or before one (1) year after the Closing Date, Buyer shall provide Seller and Shareholder with a written notice indicating that Buyer is making a claim against the Seller or Shareholder as permitted under this Agreement and specifying the factual and legal basis for such claim in reasonable detail and the amount of such claim*

(emphasis added).

Furthermore, Section 8.7 of the APA is titled "*Exclusive* Remedy"(emphasis added) and states, in whole: "The indemnification provisions set forth in this Article VIII *shall be the sole and exclusive basis for a monetary remedy of Buyer with respect to any matter related to this Agreement.*" (emphasis added). Section 8.10 of the APA further states under its title of "Damages Limitation", in pertinent part: "in no event will Seller or Shareholder be liable for any incidental, consequential or punitive damages."

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[2] The definition of "Ancillary Document" in the APA specifically incorporates the Employment Agreement.
[3] Defined as Keel in APA.

Lastly, Section 9.3 of the APA makes clear that "Buyer and Seller have participated jointly in the negotiation and drafting of this Agreement and the preparation of all Ancillary Documents. In the event any ambiguity, question of intent or interpretation arises, this Agreement including all Ancillary Documents thereto shall be construed as if drafted jointly by Buyer and Seller, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement."

In summary, the APA makes it clear that any claims brought by CIF against CJR and Keel that are related to the APA had to be brought pursuant to the provisions of Article 8 of the APA. The provisions of Article 8 make it clear that the claims brought by CIF against both CJR and Keel had to be brought only after providing CJR and Keel notice in writing of the claims within one (1) year of the July 2008 APA closing date. The claims brought by CIF were filed December 18, 2013, and there is nothing in the record establishing or otherwise evidencing CIF providing any written notification of its claims to CJR or Keel prior to July 2009. Therefore, the claims brought by CIF against Keel and CJR are time-barred by the provisions of the APA.

2. CIF's claims are barred by the statute of limitations.

Each and every one of CIF's claims against Keel and CJR, as pled, relate back to the agreements signed between CIF and Keel in July of 2008 and Keel's alleged breaches thereof. Specifically, CIF claims that Keel breached the agreements by competing with CIF and soliciting its clients, that Keel entered into the agreements by fraud and that Keel never intended to abide by the terms of the agreements. Accordingly, the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-530, providing that an action upon a contract must be brought within three years from the date the action accrues, applies to all of CIF's claims. *See* S.C. Code Ann. § 15-3-530(1) (2013). Pursuant to the discovery rule, an action accrues on the date that the aggrieved party either discovered the breach or should have discovered the breach through the exercise of

reasonable diligence. *See Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985). Accordingly, the three-year statute of limitations on all of CIF's claims against Keel and CJR accrued when CIF discovered or should have reasonably discovered the alleged breaches of the agreements at issue by Keel.

A plain reading of CIF's Third Party Complaint demonstrates that all of CIF's claims against Keel and CJR accrued in 2008 and CIF has acknowledged that it either discovered or should have reasonably discovered the alleged breaches of the Employment Agreement by Keel in 2008, more than five years prior to the filing of CIF's claims against Keel and CJR. Specifically, CIF alleges that a material term of the Employment Agreement was Keel's "promises and obligations to use (his) contacts and customer base for the benefit of CIF," but that "from the outset of Keel's employment, it became clear that Keel did not intend to lend his expertise of contacts and customer base for the benefit of CIF." Since Keel's employment with CIF began in July of 2008, CIF's pleadings and testimony acknowledge that it knew or should have known of Keel's alleged breaches of the agreements at issue in 2008.[4] Since CIF did not bring its claims against Keel and CJR until more than five years later in December of 2013, all of CIF's claims are now barred by the applicable statute of limitations, entitling Keel and CJR to judgment thereon as a matter of law.

3. The Employment Agreement is unenforceable under South Carolina law.

Keel and CJR are also entitled to judgment as a matter of law on each of CIF's claims against them because the restrictive covenants in the agreements at issue, on which all of CIF's claims are premised, are, on their face, unenforceable and, therefore, void as a matter of public policy. Specifically, the non-compete provision of the Employment Agreement, which is

[4] Evidence was also submitted to show that CIF had sought legal counsel in regard to Keel's employment in August of 2010. Even if that date were accepted as the discovery date, CIF's claims were still not filed until three years later and would still be time-barred.

essentially the same as the non-compete provision contained in the APA, provides that, while employed by the Company and for five (5) years thereafter, Keel could not "become in engaged in, or render services for, any business that competes with the business in which Company is engaged...*anywhere in the state of South Carolina.*"

For a restrictive covenant to be deemed enforceable under South Carolina law, an employer seeking enforcement thereof must demonstrate that it is "(1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by a valuable consideration." *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 42, 455 S.E.2d 2d 707, 708 (Ct. App. 1995). Restrictive covenants are to be strictly construed against employers and if a restrictive covenant is deficient in even one of the above-listed respects, it must fail as a matter of law. *Id.* Applying the criteria set forth in *Faces*, the Court finds that the non-compete provisions contained in the Employment Agreement and the APA, when construed strictly against CIF, are defective in regard to both the second and third requirements and, therefore, unenforceable as being against the public policy of South Carolina.

First, the non-compete provisions are not narrowly tailored as to time and geography. *See Faces Boutique, Ltd. v. Gibbs*, 318 S.C. at 42. The non-compete period of five (5) years goes several years beyond what South Carolina courts have generally considered as reasonable and narrowly tailored. *See Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983) (holding three year non-compete enforceable in noting that "a limitation of two or three years, may not be obnoxious in the context of a noncompetition agreement"); *see also Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (upholding two year non-compete as reasonable). Likewise, the geographic limitation of both provisions is also overly broad in

A. Breach of Contract

To survive a motion for summary judgment on a claim for breach of contract, the party alleging such claim must point to the existence of actual evidence sufficient to prove each and every one of the following elements: (1) a binding contract entered into by the parties, (2) breach of that contract and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. *See Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). CIF has not and cannot meet that burden in the instant action because it has not and cannot point to any actual evidence to prove either that Keel breached the agreements at issue or that CIF suffered any damages as a direct and proximate result of any such alleged breach by Keel.

In regard to the alleged breaches of the Employment Agreement and APA by Keel, CIF's Complaint alleges in a nonspecific conclusory fashion that "Keel breached the APA by violating Article VII of the APA relating to Noncompetition, Nonsolicitation, and Nondisparagement," and goes on to allege in a likewise conclusory fashion that "Keel breached the (Employment Agreement) both during and after his period of employ...in competing with CIF." In support thereof, and when directly asked upon what it based such allegation, CIF's owner testified that it previously "*looked like* (Keel) was in competition" with CIF. However, CIF has submitted no actual proof of any such alleged competition or solicitation. Instead, CIF's owner testified that, although it "looked like" Keel was violating the Agreement by installing Duradek on a project outside of his work for CIF in 2013, nothing in either the ADA or the Employment Agreement prohibited Keel from providing services that CIF did not provide and that CIF was not even licensed to install Duradek in June of 2013. Accordingly, even if the non-compete provisions were enforceable, Keel's installation of the Duradek project in 2013 would not have been prohibited competition. CIF's owner also admitted that, despite its claims and various allegations that Keel breached the APA by soliciting CIF's customers, CIF has no actual

proof of any such solicitation. When directly asked "(d)o you have proof that Mr. Keel solicited any of those customers," Mr. Maides responded "(w)ell, I don't have - no, I don't have anything other than to say that *we believe* he has done jobs for them." Regardless, CIF's belief without actual proof is mere speculation, which is insufficient for CIF to meet its burden of proving that Keel breached the APA by soliciting CIF's customers.

CIF also cannot meet its burden of presenting actual evidence of damages suffered as a direct and proximate result of any breach of the agreements by Keel. While CIF's claims that its business has suffered due to Keel's alleged conduct, CIF's owner has admitted that CIF has no actual proof that Keel is the cause of any loss of business suffered by CIF. Instead, CIF's owner has repeatedly testified that CIF's claimed downturn in business may simply have been the result of the recent economic recession and that CIF, like most construction businesses at the time, was hit by the recession and that some of CIF's lower sales, including those attributed to Keel, were the result of that recession. CIF's owner also admits that he is merely speculating that Keel is the reason CIF's business is not what it used to be because CIF no longer has any of its predecessor's "legacy customers" and has not been asked to bid on certain jobs. Again, however, speculation alone is insufficient to meet CIF's burden of proof that any damages suffered by CIF are the direct and proximate result of any act by Keel.

B. Breach of Contract Accompanied by a Fraudulent Act

To prove its claim for breach of contract accompanied by a fraudulent act, CIF must prove each of the following: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Rotec Servs. v. Encompass Servs.*, 359 S.C. 467, 470, 597 S.E.2d 881, 883 (Ct. App. 2004). The Court finds that CIF has not and cannot meet that burden because it cannot present any actual evidence of any of the required elements for that claim against Keel.

As outlined above, CIF has not and cannot prove that Keel breached the Employment Agreement or the APA, a fact repeatedly acknowledged by CIF's owner. Likewise, CIF cannot prove by clear and convincing evidence either a fraudulent act or fraudulent intent in Keel's part. Rather, CIF's owner has specifically admitted that he has no evidence at all to prove that Keel's alleged breaches were committed with any fraudulent intent or by any fraudulent act. Instead, and in stark contrast to its allegation that Keel never acted for the benefit of CIF and never intended to satisfy his obligations under the agreements, CIF's owner directly acknowledged the falsity of such allegation at his deposition by acknowledging that Keel did work for the benefit of the CIF and that he wanted to retain Keel because he was "making money for the company." Accordingly, CIF's claim for breach of contract accompanied by a fraudulent act fails as a matter of law.

C. Breach of Duty of Loyalty

South Carolina law recognizes a cause of action for breach of duty of loyalty on behalf of an employee in holding that it is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. *See Foreign Acad. & Cultural Exch. Servs. v. Tripon*, 394 S.C. 197, 205, 715 S.E.2d 331, 335 (2011). South Carolina courts have specifically recognized an action for breach of the duty of loyalty when an employee works to compete against the employer while still working for the employer. *Id.; citing Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 335-39, 191 S.E.2d 761, 767-70 (1972) (finding that key employees who contacted and met with investors and customer of current employer to start a competing company, left without notice, and leased space and ordered materials to build manufacturing equipment were guilty of disloyalty to employer). To make out such a claim, the alleging party must prove that the employee acted against the employer's interests or in competition therewith while still employed by the employer. *See Futch v. McAllister Towing of*

Georgetown, Inc., 335 S.C 598, 518 S.E.2d 591 (1999)(discussing when employee's alleged actions constitute breach of duty of loyalty to employer). In the instant action, CIF cannot prove that Keel ever acted against CIF's interests or in competition with CIF while employed by CIF.

CIF's Third-Party Complaint alleges Keel breached his duty of loyalty to CIF by "failing to provide his skills, contacts, customers, and other benefits uniquely maintained by Keel...and in actively planning and conducting detrimental activities against CIF, and competing against CIF, and in willfully failing to exercise any efforts to assist CIF in succeeding in the flooring business." Regardless, CIF's owner Maides acknowledged at his deposition that he has no evidence that Keel acted in competition with CIF or against CIF's interests while employed by CIF. Likewise, and despite CIF's allegation that Keel worked in competition with CIF while still employed there, when specifically asked whether he could "specifically point to anything that would prove that (Keel) was competing with (CIF)," Maides specifically acknowledged "I don't know that I have anything." Instead, Maides referred to a carpet invoice and several checks Keel received for a non-competing wall panel installation job as evidence of such competition, while acknowledging that he was not even sure what the documents he referenced as his "evidence" really were or whether or not they proved any competition.

Maides also acknowledged that CIF has no proof that Keel acted against CIF's interests or that he did not work for the benefit of CIF. In fact, when asked about that specific contention, Maides acknowledged "I would think that was probably a pretty strong statement there," before admitting that he wouldn't even agree with that allegation. Instead, Maides testified that Keel was, in fact, making money for CIF, that he wanted to keep him as an employee for that reason and that although "Keel may have not been putting in full effort...he was working for (CIF)." Notably, Maides also testified that the main basis for his claim for breach of duty of loyalty was his belief that CIF was not asked to submit bids for various jobs

because of Keel. However, and when asked if that belief was based on mere speculation, Maides responded "yes." Such speculation is insufficient, however, to meet CIF's burden of proof.

D. Fraud in the Inducement

To meet its burden of proof in regard to its claim against Keel for fraud in the inducement, CIF must establish through actual evidence the following: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Additionally, a claim involving fraud requires proof by clear and convincing evidence and, thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment. *Id.*

CIF has not and cannot meet its heightened burden of proof in regard to its claim for fraud in the inducement because it cannot establish, as a most basic requirement, that any representation made by Keel was false or that Keel had knowledge that any statement he made was false. CIF's Third Party Complaint alleges that Keel "represented to (CIF) that (he) would not engage in competitive practices of solicitation of customers, contacts, or competing business" and that "Keel knew such representations were false or made such representations with reckless disregard for their truth or falsity." However, when specifically asked what proof CIF has that Keel never intended to work for the benefit of CIF and always intended to work in competition with CIF in opposition to his representation otherwise, CIF's owner repeatedly testified that he has no proof that Keel never intended to work for the benefit of CIF or that Keel made any fraudulent statement to him. In fact, when specifically asked if he had any direct

proof of fraud other than hearsay statements by Keel's disgruntled ex-wife and the claimed downturn in CIF's profits, Maides expressly stated "(n)o, I don't know that there's any proof of fraud, you know, other than, you know, the things we've talked about."

E. Injunction

The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). In regard thereto, it is well recognized that the remedy of an injunction is a drastic one and ought to be applied with caution. *Id.* In order for the seeking party to establish that such a drastic remedy is warranted, that party has the burden of establishing "irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). In the instant action, CIF has not established and cannot establish any of those three elements, entitling Keel and CJR to judgment as a matter of law on that claim.

First, and as outlined above, CIF is without sufficient evidence to prove that it has suffered any harm as a result of any conduct on the part of Keel. Rather, CIF's owner has repeatedly testified that any downturn in CIF's profits was likely due to the recession. Second, and because CIF cannot establish through actual evidence any wrongful act on the part of Keel or any directly relatable harm to CIF, CIF cannot establish that it is likely to succeed on the merits of its claims. Indeed, the admitted basis for any and all such claims by CIF is speculation, which is insufficient for CIF to meet its burden of proving the need for an injunction. Finally, and despite CIF's allegation that "there is no immediate adequate remedy at law," there is an adequate remedy available to CIF in the form of monetary damages if CIF were able to prove any of its claims. In regard thereto, CIF's owner expressly testified that the damages he is seeking against Keel are the return of the purchase price he paid for the business.

II. Plaintiff's Claims

Summary Judgment is also appropriate as against the Defendants CJR and Maides for the following claims asserted against each by Plaintiff CIF: Breach of Promissory Note against CJR; and Breach of Personal Guarantee against Maides. As aforesaid, the Defendants agree that all of CIF's counterclaims against the Plaintiff, as well as all of CIF's defenses against Plaintiff's claims, rely on the same evidence CIF has in support of its third-party claims against Keel. As outlined above, the claims and defenses asserted by CIF and Maides as against Keel and CJR fail as a matter of law. Therefore, CIF and Maides are liable for the claims filed against them by CJR. A damages hearing shall be scheduled to determine the amount of damages owing to CJR.

CONCLUSION

For all the reasons set forth above, the Court hereby grants the Plaintiff's Motion for Summary Judgment on all causes of action it has asserted against Defendants Commercial & Industrial Floors, Inc. and Dabney Maides and on all causes of action asserted against it by Defendants. The Court also hereby grants Third-Party Defendant Christopher M. Keel's Motion for Summary Judgment on all causes of action asserted against Keel by Defendants/Third-Party Plaintiffs Commercial & Industrial Floors, Inc. and Dabney Maides.

IT IS SO ORDERED.

December 16, 2015
Greenville, SC

Edward W. Miller, Judge
Thirteenth Judicial Circuit